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IN THE

Supreme Court of the United States

October Term, 1958.

No. 912

MORRIS EISENBERG, ET AL.,
Petitioners,

v.

FRANCIS R. SMITH,
Collector of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1958.

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v.

FRANCIS R. SMITH,
COLLECTOR OF INTERNAL REVENUE;
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

MORRIS EISENBERG, FANNIE EISENBERG, HERMAN SCHAEFFER and ROSE SCHAEFFER, by their attorneys, respectfully petition that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered on February 13, 1959.

OPINIONS BELOW.

The opinion of the Court of Appeals in these consolidated cases is to be found in 263 F. 2d 827 (C. A. 3, 1959) and is printed in the Appendix hereto. These are the final judgments of the United States Court of Appeals

for the Third Circuit, where judgments were entered for respondent affirming the judgments of the United States District Court for the Eastern District of Pennsylvania. Chief Judge Biggs dissented.

JURISDICTION.

The judgments of the United States Court of Appeals for the Third Circuit were entered on February 13, 1959. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

In a civil trial by jury in which petitioners seek the refund of federal income taxes and interest paid as deficiency assessments in a family partnership situation, is it not reversible error for government counsel in his closing jury argument to accuse two of the parent petitioners of "steal[ing]" money from their children's savings account trusts to invest in the business when the record was absolutely barren of any evidence of such criminal conduct?

THE STATUTES INVOLVED.

The applicable federal tax statutes governing the years involved in the jury trial below are in the 1939 Code, as Amended, 26 U. S. C.:

"§ 181. *Partnership not taxable.*

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

"§ 182. *Tax of partners.*

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

. . . .

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183(b) . . ."

"§ 3797(2): (2). *Partnership and partner.*

The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture or organization . . ."

STATEMENT OF THE CASE.

Petitioners Morris Eisenberg and Fannie Eisenberg (husband and wife), Herman Schaeffer and Rose Schaeffer (husband and wife) petition from the denial of their appeal below. Consolidated trial by jury was had originally in two cases involving common questions of law and fact and verdicts and judgments were rendered in favor of respondent in each case. The trial court denied petitioners' alternative motions for judgments n. o. v. or for a new trial. On February 13, 1959, the Court of Appeals for the Third Circuit affirmed the trial court. Chief Judge Biggs dissented.

These are civil actions in which petitioners seek refunds of federal income taxes and interest paid by them for the calendar years 1945 through 1949 inclusive pursuant to deficiency assessments made by the Internal Revenue Service. In each case, the issue was whether income received from 1945 through 1949 from seven trusts created by the husband petitioners in favor of their seven children and made partners in the business of Bailey's Furniture Company (Bailey's) is taxable to the trusts or to the settlors. The amounts of tax involved were not in dispute.

In March, 1930, after years of previous business association, Mr. Eisenberg, motivated primarily by a desire to protect his first-born child Leon (33a) and on the advice of a bank officer (173a), opened savings accounts in his name as trustee for each of his three children.

Mr. Schaeffer, with the same motivation, established similar accounts in a savings bank in his name as trustee for his four children (70a).

Bailey's was commenced on October 30, 1936, after sixteen years in which Eisenberg and Schaeffer were in business together (173a). Shortly thereafter, Eisenberg and Schaeffer were seriously in need of capital in an enterprise whose successful operation was vitally dependent upon the availability of substantial amounts of working capital sourced in the business, rather than borrowed from commercial banks (35a-36a, 67a, 175a).

Schaeffer therefore borrowed over $20,000.00 from his four children's bank accounts between July 30, 1936 and April 18, 1939, and Eisenberg borrowed a similar amount from his three children's bank accounts. All the loans were invested in Bailey's (3a-4a, 9a, 15a-16a, 22a, 173a). Thereafter, further sums aggregating an additional several thousand dollars were withdrawn from the children's accounts to be used in the business (173a).

The original written partnership agreement (143a-148a) which governed the business relationships of the partners thereunder was entered into on December 30, 1939. Its purpose was to reduce to writing an oral partnership agreement between Eisenberg and Schaeffer as of January 1, 1937 to engage in the retail installment sales of furniture and household goods (35a). The partnership was to continue for one year and thereafter from year to year unless either of the parties gave ninety days notice of his intention to withdraw. The respective capital accounts of the two partners would be considered as $60,000.00 each. The two original partners were each to receive the sum of

$7,800.00 in salary for the year 1940 which would be considered an expense of the business before the determination of profits. Any increase in salary required unanimous agreement.

With the passage of time, Eisenberg and Schaeffer found they could not repay the loans they had made from their children because the funds were tied up in Bailey's installment leases. On the advice of counsel, Eisenberg and Schaeffer accordingly created seven trusts for each of their children on January 2, 1940, and the settlors filed federal gift tax returns therefor (36a-37a, 180a, 181a).

The seven trusts, which at the instigation of their beneficiaries were subsequently reformed in May, 1943 by final decree of the Common Pleas Court of Philadelphia County, were irrevocable interests totalling 50% of the partnership of Eisenberg and Schaeffer. The reformed trusts are those involved in the taxable years in suit: 1945 through 1949 inclusive (152a et seq.).

The reformed trusts which are identical except for the designation of beneficiaries and the respective interests of the trusts in Bailey's are irrevocable and Eisenberg and Schaeffer bound themselves individually and as co-partners to their terms. The trusts are to terminate when each beneficiary arrives at 40, or, if the settlor dies beforehand, then at 30. They also terminate at the beneficiary's death and principal and income go by an express scheme to their issue or the other trusts as if by intestacy.

No principal is to be distributed until termination, but trustees have untrammeled investment and reinvestment rights. No income is to be used for support during beneficiaries' minority but thereafter discretionary income distributions can be made. At their absolute option, the trustees can withdraw the net worth of the trusts and can demand payment of the trusts' profits and income. They are entitled to and received full disclosure of the firm's finances. Provisions are also made for admission of the beneficiary into Bailey's. On termination, bene-

ficiaries are to receive all principal and accumulated income. Under no circumstances can either income or principal be used for the benefit of the settlor (155a).

Allocations of the partnership's net profits were made throughout the period in question with meticulous adherence to the underlying partnership agreement (170a, 171a, 175a, 5a, 10a, 17a, 23a). The trusts' accounts were credited with their shares of annual profits and partnership tax returns were filed setting forth the shares of partnership profits (170a, 175a, 5a, 10a, 17a, 23a). The government stipulated to the accuracy of the books and records demonstrating those facts (175a).

At the conclusion of the trial government counsel, in his summation to the jury made reference to the original funds petitioners withdrew from the aforesaid savings accounts and invested in Bailey's. He pressed the following argument to which petitioners' counsel made immediate objection (125a):

> ". . . When it came 1936 and Schaeffer and Eisenberg wanted to open up a business they didn't have the money on their own, so what do they do? They steal the kids' money." (125a)

This baseless, inflammatory argument was urged below as a distinct ground for the grant of new trials.

In his dissenting opinion, Chief Judge Biggs found that the argument was "egregious"[1] error justifying new trials. While conceding that the quoted language was "too strong",[2] the majority below refused to order a reversal. This Petition for a Writ of Certiorari follows.

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1. 263 F. 2d 827 at page 833.
2. *Id.* at page 831.

REASONS FOR GRANTING THE WRIT.

1. This decision is in conflict with the decisions of this Court in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 (1935); *New York Cent. R. Co. v. Johnson*, 279 U. S. 310, 49 S. Ct. 300 (1929).

2. This decision is in conflict with the decisions of the same Court of Appeals in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954); *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955).

3. This decision is in conflict with *Wagner v. United States*, 263 F. 2d 877 (C. A. 5, 1959).

4. Unless corrected, this decision will stand as an invitation to government counsel in civil cases to press prejudicial, inflammatory arguments which would not be countenanced by the federal courts in criminal matters. The sovereign's obligation in conducting itself in civil cases should be no less than it is in criminal cases: to see that justice shall be done. It was not done here.

Argument.

GOVERNMENT COUNSEL'S CLOSING ARGUMENT IRREPARABLY PREJUDICED PETITIONERS' MERITORIOUS CLAIMS. SUCH INFLAMMATORY CONDUCT SHOULD PLAY NO PART IN THE TRIAL OF CAUSES. THE SAME STANDARDS GOVERNING THE CONDUCT OF GOVERNMENT COUNSEL IN CRIMINAL MATTERS MUST OBTAIN IN CIVIL MATTERS AS WELL.

The tax aspect of these actions is governed by decisional law arising out of the controlling case of *Commissioner of Internal Revenue v. Culbertson*, 337 U. S. 733, 69 S. Ct. 1210 (1949). Petitioners produced very powerful, consistent and credible proof that the standards laid down by *Culbertson* to determine the fact question of whether this was a bona fide family partnership were fully satisfied. Much of this proof was established by stipulation of the government as to its accuracy or by government admissions.

Furthermore, the oral testimony in the case was uncontradicted and there was no suggestion of impeachment of petitioners' witnesses. The government did not offer a single bit of affirmative evidence in support of its position that this was not a recognizable family partnership.

Having no defense to the merits of the action, the government successfully directed its energies to exploiting the passions and prejudices of the jury. As Chief Judge Biggs very trenchantly observed in his dissent at 263 F. 2d 832:

> "• • • As the majority opinion well puts it: 'The question for the jury turned upon the very difficult problem: Was all this an actual bona fide partnership or was it something that looked like a partner-

> ship and was not?' Into this delicate and vital issue of fact counsel for the Collector threw to the triers of fact his bald and, to me, unjustified comment. The *kids* referred to were the taxpayers' own children. It would be difficult to think of a remark better calculated to inflame a jury." (Emphasis the court's.)

The treatment the majority below gave this shocking breach of fair advocacy is of especial concern because, we respectfully submit, it is manifestly in conflict with standards of conduct laid down by that very court as well as other federal appellate courts including this one.

The majority below conceded that government counsel's language was "too strong". But the majority then sought to drain the government's jury speech of its venom by placing the taxpayers in a "dilemma" said to be "obvious". Speaking for the majority Judge Goodrich said at 263 F. 2d 832:

> "* * * If the suggestion is made that the original gift to the children was not complete, then the foundation for the claimed partnership is weakened. On the other hand, if there was a complete gift, then the taxpayers were doing something which, as trustees, they ought not to have done."

On analysis this "dilemma" turns out to be purely chimerical.

FIRST: Whether or not the original gift to the children was complete is irrelevant to the question of the foundation of the claimed partnership. The capital around which the issue of partnership turned was not *that* capital, but the partnership interests in each of the seven irrevocable trusts which Eisenberg and Schaeffer created and as to which federal gift taxes were returned (180a-183a, 149a et seq., 152a et seq.).

Furthermore, even if the savings accounts were the capital in question, the origin of that capital is totally immaterial. That is the square holding of the *Culbertson* case, *supra*. It is also the clear position of the Bureau of Internal Revenue in Mim. 6767, 1952-1, CB 111 issued on February 19, 1952 as a result of *Culbertson*:

> ". . . The Bureau considers that the test of business purpose may be satisfied by the single fact (if it be a fact) that the alleged partner has invested in the business money or property, useful to the business, of which he or she is the real owner under the principles stated in section 1 hereof, *even though such money or property had already been used in the business before the alleged partner acquired any interest therein.* . . ." (Italics supplied.)

See also: *Pike v. U. S.*, 231 F. 2d 688 (C. A. 9, 1956).

SECOND: Whether or not the taxpayers were doing something they ought not to have done as trustees of the tentative trusts in the bank accounts is utterly immaterial to the only issue in the case: the validity of the partnership. The majority suggested nothing that would connect this second supposition to the merits of this case.

The exposure of error in the majority's reasoning is but another way of demonstrating the true purpose behind the government's closing argument. It was a naked appeal to passion and irrationality and to nothing else.

It is safe to say government counsel knew that in this type of case, a jury starts out predisposed against an obviously affluent[3] taxpayer who is seeking to recover, as the jury was advised by government counsel, (124a) "a refund of taxes that have already been paid, collected and have been probably spent". That smouldering bias could not

3. The evidence was more than abundant proof of this. It was introduced by the government in exhibits which, for instance, showed that in 1948 Eisenberg received $8,000.00 in dividends over and above the $42,000.00 plus income from Bailey's (184a-186a).

help but burst into flame when the totally false, baseless and legally unwarranted accusation was made. That was the only conceivable purpose of the argument, and it worked precisely as the government meant it to work.

The Court below has set strict standards of conduct for trial counsel in the Third Circuit. In *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955), Judge McLaughlin held at page 182:

> "* * * Civil or criminal, a trial is not a contest in which no holds are barred. It is the determination of basic rights under our Constitution. Knowledge, skill and experience in the presentation of the contentions of the parties are helpful to the court and jury but misused to deprive a litigant of its day in court the result can be as it is in this appeal. Winning, so called, at all cost puts the cost too high."

The adjudication below has been made in direct conflict with that standard of conduct. It also is in conflict with the view of that same court in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954).

Not only has this relaxation of standards caused intra-circuit conflict but it has also violated this Court's clear injunction in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 (1935) where Mr. Justice Sutherland stated at 295 U. S. 87, 55 S. Ct. 633:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he

is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none".

See also *New York Cent. R. Co. v. Johnson*, 279 U. S. 310, 49 S. Ct. 300 (1929) and *Wagner v. United States*, 263 F. 2d 877 (C. A. 5, 1959).

There is utterly no reason why the conduct of government counsel in civil matters should not be controlled by the same considerations as those laid down in *Berger*. Certainly the blow struck here was foul. Equally certainly, it alone explains the injustice of the result. Verdicts won by such contaminated means should not be permitted to stand. The administration of civil justice cannot tolerate the sovereign's counsel baselessly accusing citizens with meritorious claims of stealing money from their children. The Writ should issue to accomplish what the government's counsel deliberately prevented from being accomplished: to see that justice is done.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH S. LORD, III,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
Counsel for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,713

MORRIS EISENBERG AND FANNIE EISENBERG,
Appellants

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE.

No. 12,714

HERMAN SCHAEFFER AND ROSE SCHAEFFER,
Appellants

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued January 6, 1959

Before BIGGS, *Chief Judge*, and GOODRICH and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 13, 1959)

By GOODRICH, *Circuit Judge*.

These are suits by the taxpayers, Eisenberg and Schaeffer, to recover on what they claim to be incorrect

exactions of income tax for the years 1945 to 1949, inclusive.[1] Plaintiffs have paid their tax and now seek to get it back. They lost in the lower court. The focal legal controversy is whether they were improperly taxed as the sole partners in a concern called Bailey's Furniture Company instead of bearing their fractional proportion of what is claimed as being a partnership made up of nine partners.[2] There are three principal issues in the case.

I. Are the Plaintiffs Properly in Court?

The Government raises a number of questions concerning whether the plaintiffs have standing in this Court to pursue their appeal. It is pointed out that instead of the appeal being taken from the judgments of the district court bearing date November 18, 1957, they are appealing from an order denying alternative motions for judgment notwithstanding the verdict or for a new trial. As to the first the Government says that the new trial is a matter within the discretion of the trial court and is not reviewable on appeal. But on an appeal properly taken this Court has a limited review to determine whether the trial court abused its discretion, even where, as in this case, a new trial was sought on the ground that the verdict was against the weight of the evidence. See *John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co.*, 239 F.2d 815, 816 (3d Cir. 1956); *Hill v. Pennsylvania Greyhound Lines, Inc.*,

1. The wives of taxpayers Eisenberg and Schaeffer are joined as plaintiffs because these taxpayers made joint returns. They have no individual interest in the controversy aside from that which flowed from the joint return.

2. The Internal Revenue Code of 1939 governs this case. The applicable section provides with respect to the years in question that "the term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization." Int. Rev. Code of 1939, 26 U. S. C. § 3797(a)(2) (1955).

174 F.2d 171, 172 (3d Cir. 1949). 6 MOORE, FEDERAL PRACTICE ¶ 59.08[5], p. 3820 (2d ed. 1953).

The Government next says that the plaintiffs are not entitled to consideration of their motion for judgment notwithstanding the verdict, because they made no motion for a directed verdict at the conclusion of the presentation of all the evidence. F.R. Civ. P. 50(b) provides that ". . . a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . ." Rule 50(a) states that "A motion for a directed verdict shall state the specific grounds therefor." These plaintiffs, in the first of their requested points for charge to the jury, did ask for the following: "On the basis of the evidence and the applicable law, you are directed to find a verdict for the Plaintiffs."[3]

This request, thrown in along with a considerable list of points for charge, is not, we think, a compliance with the rule as stated in section 50(a) and quoted above. It certainly gives the trial judge no hint of what the position of the party making the motion is, except that he wants the lawsuit decided in his favor. The purpose of the rule requiring the stating of grounds is, of course, to let the trial judge and opposing counsel see what the problem is so that the decision will be the best than can be had. 5 MOORE, FEDERAL PRACTICE ¶ 50.04, p. 2321 (2d ed. 1951). *Virginia-Carolina Tie & Wood Co., Inc. v. Dunbar*, 106 F.2d 383, 385 (4th Cir. 1939); *Ryan Distributing Corp. v. Caley*, 147 F.2d 138, 140 (3d Cir. 1945).

In addition to what has been said above, we must also notice Rule 73 dealing with "Appeal to a Court of Appeals." That rule provides as follows:

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3. Plaintiffs' motion for judgment notwithstanding the verdict states that the "plaintiffs move the Court, in accordance with plaintiffs' binding instructions presented at the close of the evidence, to set aside the verdict and the judgment entered thereon and to enter judgment n.o.v. in favor of the plaintiffs.".

"(a) *When and How Taken.* • • •

"A party may appeal from a judgment by filing with the district court a notice of appeal. • • •

"(b) *Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. • • •"

As already pointed out this appeal was not from the judgment.[4] How can we say that Rule 73 is complied with?

All this leaves the plaintiffs in a rather unhappy procedural position. We should prefer not to have the case rest on this ground alone, however. The rules of civil procedure are designed to assist civil business in an ordinary fashion but surely should not be so literally interpreted as to prevent a fair result in a meritorious case. We pass, therefore, to the other parts of the case which deal with the merits.

II. Are Plaintiffs Entitled to a Judgment Notwithstanding Verdict or to a New Trial?

The taxpayers cite to us the case of *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943), in which the Court, through Mr. Justice Reed, points out that when the evidence is such that "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict," it is the trial court's business to see that that conclusion is reached. We have no doubt of this rule. *Ryan Distributing Corp. v. Caley*, 147 F.2d 138, 140 (3d

4. 28 U. S. C. § 1291 (1952) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

The word "decision" as used in § 1291 of the Judicial Code is equivalent to "judgment" under Rule 73. This point is ably covered by Judge Magruder in In re Forstner Chain Corp., 177 F. 2d 572, 576 (1st Cir. 1949). The case also contains a lucid explanation of the nature of a "judgment." *Id.* at 476-78.

Cir. 1945). 5 MOORE, FEDERAL PRACTICE ¶ 50.02[1] (2d ed. 1951). Neither does any other informed lawyer. But acceptance of this general proposition is a long way from saying that it applies to this case.

The appellants properly lay great stress on the decision in *Commissioner v. Culbertson*, 337 U.S. 733 (1949). They take a passage from the discussion by the Chief Justice which sets out the test for determining whether a family partnership exists. The paragraph they quoted and relied on reads as follows:

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." 337 U.S. at 742.

Taxpayers then proceed to argue that the undisputed evidence, consisting of documents and stipulated facts, is sufficient to make out an indisputable case for the conclusion that these taxpayers did establish a family partnership consisting of Morris Eisenberg, Herman Schaeffer and seven family trusts. The argument is a perfectly legitimate argument to make. But the conclusion is wrong.

This case was very skillfully handled by the trial judge as he presented it to the jury. He must have had the *Culbertson* decision on the bench in front of him or else very recently read it with great thoroughness. Several

times he stated to the jury the problem which it had to decide: "whether there really was a partnership existing between these two partners and the seven trusts . . . ." "Did these parties . . . in good faith and acting with a business purpose intend to join together in the present conduct of this enterprise?" "You have to take the whole record together, all the evidence in the case, and try to determine what the intention honestly was."[5] In his opinion denying the motions for judgment or for a new trial the judge correctly points out what the *Culbertson* decision did. It "definitely discarded the use of objective tests in family partnership cases." That, we think, is right.[6] The test now is a subjective one, as the judge gave it to the jury. It compels the trier of the fact in each case to ascertain the intent of the parties entering into a transaction which may or may not constitute a partnership under the United States tax laws depending upon the state of mind of the individuals involved. As the Supreme Court in *Culbertson* points out in a footnote in the language of Lord Justice Bowen: " 'the state of a man's mind is as much a fact as the state of his digestion.' " 337 U.S. at 743, n. 12.

All this the trial judge had in mind, and the Supreme Court in deciding *Culbertson* had it in mind. If the plaintiffs in this case had demonstrated intent with the definiteness with which the objective facts are established, they would have an argument which would entitle them to the relief they seek. But the case is far from that.

Messrs. Eisenberg and Schaeffer are long business associates. In 1936 they started the business enterprise known as Bailey's Furniture Company. Most of the company's original capital came from various savings accounts which each of the two men had previously established in his own name as trustee for one or other of his

5. The jury charge of the district court is reported at 58-1 USTC ¶ 9193 (CCH).

6. See, *e.g.*, Ardolina v. Comm'r, 186 F. 2d 176, 180 (3d Cir. 1951); Jahn v. Pedrick, 229 F. 2d 71, 73 (2d Cir. 1956).

children. Several years later, in 1940, the money not being paid back to the children's accounts, they set up these seven trusts for the benefit of the children with each settlor the trustee for his own children. The trusts were reformed in 1943 and in each case the settlor's wife was co-trustee with a brother-in-law of the settlor. So far as the records show the wives did not participate in the management of either the trusts or of the Bailey's Furniture enterprise. One of the trustees during the period in question had died; the other was a witness. He disclaimed any familiarity with the operation of the installment furniture business; but he did give some testimony about meeting and talking over the business with Messrs. Eisenberg and Schaeffer. Deceased trustee, of course, could not be heard from.

The evidence revealed that certain of the company's charitable contributions were credited solely to Eisenberg and Schaeffer, and not to the trusts. Eisenberg and Schaffer drew heavily on their shares of the capital account; the capital account of the trusts remained untouched. Although there is testimony that on some occasions the taxpayers discussed business policy with the trustees, it is clear that Eisenberg and Schaeffer alone controlled the operation of the business. True, one of Schaeffer's sons did participate actively in the business after he came back from the Army; but it is to be remembered that in the taxable years in question he was not a trustee, but one of the beneficiaries of the trust.

There really was very little actual dispute on the oral testimony presented and, of course, none on the facts that were stipulated in the documents which were introduced. While under the *Culbertson* decision no one of the facts referred to above sufficed to prove either the existence or nonexistence of the partnership, there was enough of a cloud in the picture to warrant submission of the case to the jury. The question for the jury turned upon the very difficult problem: Was all this an actual bona fide partnership or was it something that looked like a partnership

and was not? We certainly cannot say that the conclusion of the jury that this was not a bona fide partnership under the tax laws of the United States is an irrational conclusion. Accordingly, the trial judge's refusal to enter a judgment notwithstanding the verdict was not error; nor was his refusal to grant a new trial on the ground that the verdict was against the weight of the evidence an abuse of discretion.

III. Do the Statements of Counsel Entitle Plaintiffs to a New Trial?

The taxpayers complain bitterly about a remark made by counsel for the Government in his summation. In the course of his address to the jury he discussed the original trusts set up by Eisenberg and Schaeffer for their children. Then he said:

> "When it came 1936 and Schaeffer and Eisenberg wanted to open up a business they didn't have the money on their own, so what do they do? They steal the kids' money."

The language is described by the appellants as an "irrelevant untruth" which "far transcended the bounds of decent advocacy. . . ." We agree that counsel's language was too strong. This Court has several times talked about improprieties of counsel in the course of trial and has, in a strong enough case, reversed and ordered a new trial for that reason. See *Straub v. Reading Co.*, 220 F.2d 177 (3d Cir. 1955); *Robinson v. Pennsylvania R.R. Co.*, 214 F.2d 798 (3d Cir. 1954).

The set of facts which led up to this comment was this. In 1930 these taxpayers established the savings accounts for the children with themselves as trustees. When later they started this furniture business they needed capital. They proceeded to get that capital from the savings funds thus established. No note was given. No interest was

paid. They simply took the money from the savings accounts and used it in the business. In other words, the situation, on its face, is that of a declared trustee using the trust res for his own business without any indication of the knowledge or consent of the beneficiaries. RESTATEMENT, TRUSTS § 170, comment *l* (1935). The dilemma in which the taxpayers are left with this situation is obvious. If the suggestion is made that the original gift to the children was not complete, then the foundation for the claimed partnership is weakened. On the other hand, if there was a complete gift, then the taxpayers were doing something which, as trustees, they ought not to have done.

All of this was the background of the charge made by Government counsel in the excerpt quoted.

In examining the seriousness of what could have happened from the charge made, we should look at the record and see what the court did. Taxpayers' counsel objected to the remark as improper. The judge said, "I wouldn't characterize it as stealing." Counsel argued that since there was no note given he thought his argument was proper. Then the court said, "I would hesitate to characterize it as that. I don't think it was." Then the taxpayers' counsel suggested it was a tentative trust and the court said he would take back what he said. Finally, the judge concluded, "I was just trying to tone down the statement that they stole the money, which I don't think they did. I do think it could have been held to be a breach of trust under certain circumstances."

This was all there was to it. The jury would certainly take the word of the judge on the legal point as against the argument of counsel. And the judge made it perfectly clear that "stolen" was not the proper characterization of the withdrawal of the money.

This trial was not a rough and tumble affair as was the situation in other cases which we have had recently in this Circuit. See *Russell v. Monongahela Ry. Co.*, —

F.2d — (3d Cir. 1958); *United States v. Stirone*, — F.2d — (3d Cir. 1958). In fact, as lawsuits go, it was quiet as a tax case should be. The Government attorney in his summation did not make an impassioned oration. The one thing he did was to say "stolen" instead of "improperly withdrew." That is not enough for reversal.

The judgment of the district court will be affirmed.

BIGGS, *Chief Judge*, dissenting.

I concur with the majority in respect to points "I" and "II" of the opinion but I cannot agree as to point "III" relating to statement made by the Collector's counsel in his summation to the jury as to the conduct and intent of the Eisenbergs in setting up the family partnership: "They steal the kids' money." As the majority opinion well puts it: "The question for the jury turned upon the very difficult problem: Was all this an actual bona fide partnership or was it something that looked like a partnership and was not?" Into this delicate and vital issue of fact counsel for the Collector threw to the triers of fact his bald and, to me, unjustified comment. The *kids* referred to were the taxpayers' own children. It would be difficult to think of a remark better calculated to inflame a jury. It was as "flagrantly abusive" as the statements we so characterized in Robinson v. Pennsylvania R. Co., 214 F.2d 798, 801-802 (1954), and which furnished a basis for reversal in that case. The remark was an error as egregious as that which we so characterized in Watn v. Pennsylvania R. Co., 255 F.2d 854, 858-859 (1958). Cf. Straub v. Reading Company, 220 F.2d 177 (3 Cir. 1955). Moreover, the trial court, though making some remarks about counsel's statement, did not inform the jury to disregard it.

Trial of jury cases is not an easy matter and counsel should conduct themselves in a proper manner before court and the jury. Difficulties invariably arise when counsel become abusive. The dignity and prestige of a court are affected thereby and trials tend to become heated and partisan. I think that under the circumstances the Collector should not have the advantage of his verdict and I would order a new trial.

For the reasons stated I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,713

Morris Eisenberg and Fannie Eisenberg,
Appellants

v.

Francis R. Smith, Collector of Internal Revenue.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge,* and GOODRICH and STALEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

February 13, 1959.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,714

Herman Schaeffer and Rose Schaeffer,
Appellants,

v.

Francis R. Smith, Collector of Internal Revenue.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge,* and GOODRICH and STALEY, *Circuit Judges.*

JUDGMENT.

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IDA O. CRESKOFF,
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February 13, 1959.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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No. 912

In the Supreme Court of the United States

OCTOBER TERM, 1958

MORRIS EISENBERG, ET AL., PETITIONERS

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 191a-192a) is unreported.[1] The opinions of the Court of Appeals (Pet. 13-23) are reported at 263 F. 2d 827.

JURISDICTION

The judgments of the Court of Appeals were entered on February 13, 1959. (Pet. 24-25.) The petition for a writ of certiorari was filed on May 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

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[1] Record citations are to the appendix to petitioners' brief in the Court of Appeals.

QUESTION PRESENTED

Whether the courts below erred in holding that a statement made by counsel for the Collector in his closing argument to the jury did not require a new trial.

STATEMENT

These are refund suits to recover deficiencies in income taxes paid for the years 1945 through 1949 by the taxpayers Morris Eisenberg and Herman Schaeffer.[2]

These deficiencies were assessed and paid after a determination by the Commissioner that income of the partnership (operating under the name of Bailey's Furniture Company) should not be divided for tax purposes between taxpayers and the seven trusts which they had created for their children, but should be reallocated between the two taxpayers as the only partners of that company. (R. 3a-8a, 15a-21a, 176a.)

Thus the issue raised by the pleadings and tried by the District Court was whether the taxpayers and the trusts were partners, *i.e.*, whether they had actually intended to join together for the purpose of presently carrying on a business and sharing in the profits or losses. The District Court gave full instructions on that issue (R. 126a-133a) and a verdict for the Collector was returned by the jury in each case. Following denial of the taxpayers' motions for new trial and to set aside the verdicts, the District Court entered judgments for the Collector. (R. 139a, 187a-193a.) The Court of Appeals affirmed, one judge dissenting (Pet. 13-23.)

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[2] As joint returns were filed for the last two years, the wives of the above taxpayers are also involved, although they had no interest in the partnership which produced the income.

No issue on the merits is involved. The sole basis of the petition for certiorari is a remark made by counsel for the Collector in his closing argument to the jury. In commenting upon the evidence and statements made by taxpayers' counsel in arguing to the jury, counsel for the Collector said (R. 124a-125a)—

> One word Mr. Polisher kept using that struck me in his closing argument was this word "sacred." He said a trust is "sacred," but it seems to me to be a little bit inconsistent to argue the sanctity of these trusts when you stop and consider what Mr. Schaeffer and Mr. Eisenberg did with the money that they had set aside for their children in a trust account in 1930. When it came 1936 and Schaeffer and Eisenberg wanted to open up a business they didn't have the money on their own, so what do they do? They steal the kids' money.

Upon objection by taxpayers' counsel to the last sentence of those remarks the District Court ruled that what the taxpayers did should not be characterized as stealing, but stated that taxpayers took the money without legal right to do so. Counsel for the Collector then replied "All right sir. The fathers take the children's money without any legal right to do so." Taxpayers' counsel again objected. The District Court stated that it would take back what it had just said and further explained that taxpayers' act "could have been held to be a breach of trust under certain circumstances." (R. 125a.) After that explanation by the court, taxpayers' counsel made no further objection until after the jury had returned a favorable verdict for the Collector.

The background of the comment by Government counsel is as follows (Pet. 20-21): In about 1930, both taxpayers established savings accounts for their children, with themselves as trustees. Several years later, when the taxpayers created their partnership and started in the furniture business, they needed extra capital and got what was needed by withdrawing the funds from their children's savings accounts. Taxpayers testified that they borrowed these funds. (R. 3a-4a, 15a-16a, 36a, 72a-73a, 173a.) But the record does not show that any note was ever given or interest paid. They simply took the money from the savings accounts and used it in the business. (Pet. 20-21.) Subsequently, in 1940, the taxpayers created trusts for each of their children and again named themselves trustees. Those trusts were reformed in 1943 and other trustees were then named. In creating these trusts, they purportedly transferred an interest in the partnership to each trust. (R. 174a-175a.) Taxpayer Schaeffer testified that when in 1940 they found they could not repay their children they decided to take them in as partners. (R. 74a.) But the gift tax returns which taxpayers filed in 1940 show that the partnership interests were transferred to the trusts not as repayment of loans but as gifts, and taxpayers' counsel stated during the trial that the taxpayers did make these gifts in 1940. (R. 138a, 180a-183a.)

ARGUMENT

The decision below was within the bounds of discretion and does not raise an issue calling for examination by this Court.

The sole basis for taxpayers' petition is a remark made by counsel for the Collector in his argument to

the jury. (Pet. 2, 8.) However, in contending that this remark constitutes reversible error, taxpayers attempt to bring in indirectly the partnership issue, asserting that the evidence which they produced fully satisfied the requirements for proving a *bona fide* family partnership and that, because of the absence of any evidence to support the Collector's position, the energies of Government counsel were directed to exploiting the passions and prejudices of the jury. (Pet. 8.) The taxpayers are in error both as to the nature of the evidence on the partnership issue and as to the effect to be given the remark of Collector's counsel.

The Court of Appeals held (Pet. 16-20) that these cases were very skillfully handled by the trial judge, who based his instructions on *Commissioner* v. *Culbertson*, 337 U.S. 733; that there was enough doubt as to the existence of the partnership to warrant submission of the question to the jury; and that it could not be said that the jury's conclusion was irrational or that the trial judge was in error in refusing to enter judgments notwithstanding the verdicts or to grant a new trial.

The Court of Appeals held further that counsel's remark did not require reversal, pointing out that the trial was not a rough and tumble affair, that it was in fact, as lawsuits go, "quiet as a tax case should be," that the one thing which counsel did was to say "stolen" instead of "improperly withdrew," and that he did not make an impassioned oration. (Pet. 21-22.) In reaching its conclusion, the Court of Appeals considered that the trial judge had immediately corrected counsel's remark to make it clear that stealing was not the proper characterization for the withdrawals from the savings accounts.

It has long been the rule that the power to set aside a verdict for misconduct of counsel should be sparingly exercised on appeal. The determination of the extent of permissible comment and argument by counsel rests primarily in the discretion of the trial court which is in the best position to decide if what has been said is seriously prejudicial. *Dunlop* v. *United States*, 165 U.S. 486, 498; *Twachtman* v. *Connelly*, 106 F. 2d 501, 509 (C.A. 6th); *Ocean Accident & Guarantee Corp.* v. *Penick & Ford*, 101 F. 2d 493 (C.A. 8th); *Maryland Casualty Co.* v. *Kelly*, 45 F. 2d 788 (C.A. 4th). In the heat of argument, counsel may occasionally make prejudicial remarks, but if the court promptly and effectively intervenes the error will usually be treated as cured. *Fidelity Phenix Fire Ins. Co. of New York* v. *Valtone*, 74 F. 2d 137 (C.A. 5th), certiorari denied, 294 U.S. 727; *City of Wheeling* v. *John F. Casey Co.*, 74 F. 2d 794 (C.A. 4th), certiorari denied, 296 U.S. 593; *Affleck* v. *Chicago and North Western Railway Co.*, 253 F. 2d 249 (C.A. 7th). That is particularly so when the District Court sustains an objection to remarks made by one counsel and opposing counsel does not move thereafter for a mistrial. *Uhl* v. *Echols Transfer Co.*, 238 F. 2d 760 (C.A. 5th).

The Court of Appeals has made an examination of the entire record in this case. It has considered, in the context of the whole proceeding, the single incident which is made the basis for the petition filed in this Court. It has taken into account the corrective measures adopted by the District Judge and the probable effect of the incident, all circumstances considered, upon the jury. Since there has been a reasonable and a careful evaluation of the incident by the Court of

Appeals, we think that this civil case, which lacks any element of general importance, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1959.

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